

Core Concepts in Environmental Liability – Critical Role of Insurance in Brownfields Transactions

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Overview

- 1980 until early 1990's when CERCLA was enacted
- Early 1990's and thereafter large demand for environmental liability insurance
- Today handful of specialized insurers offering coverages



Brownfield Team

- Environmental Professional
- Legal Counsel
- Environmental Insurance Broker



Alternatives / Solutions



- Walk away from property / project
- 'Swiss cheese' the site
- Seek indemnity / liability relief
- More data for lender
- NFA for known contamination
- Place Environmental Liability Insurance

Pollution Legal Liability

- Environmental 'Boogie Man'
- Presumes that investigation conducted
- Known contamination excluded



PLL Underwriting

- Application & All Investigative Reports
- 30 to 90 Days
- Underwriting review – in-house and ‘out-house’
- Counsel review – in-house and ‘out-house’
- Additional data or investigations
- Multi-year policy terms



Insurance Carriers

- Not all created equal
- Debt Ratings / AM Best Ratings
- History / Experience
- Capacity
- Integrated Product / Service
- Appetite for Risk
- Policy Forms



Insurance Transaction



- Understand exposures and the transaction stakeholders' needs: buyer, seller, financier
- Review policy wording before closing to avoid surprises
- Changes during policy term, i.e. intended use, sale
- Commitment to service for full policy term: exit strategy, changes, claims

Secured Creditor

- Placed by Financial Institutions
- Difficult to obtain
- Significant exclusions
- Protection for bank only
- Extent of mortgage
- No protection for property owners



Commercial Lenders

A property's environmental condition is an area of concern for Lenders when evaluating loan applications. Common environmental concerns include:

- Historic property use
- Current environmental projects
- Existing environmental permits
- Diminution in value

Environmental Premises Commercial Lender Policy

Tailored specifically to protect secured creditors from liability arising out of known and unknown pollution conditions at the insured real estate.

- Limits up to \$50m each pollution condition and \$100m aggregate
- Policy term up to 13 years
- Covers locations in USA and/or Canada
- Minimum premium \$5,000

Lender Liability Policies

Policy Benefits

- Coverage for remediation of secured real estate
- Coverage for the lesser of the estimated remediation costs or remaining loan balance following a default
- Coverage for third party bodily injury and property damage
- Coverage for diminution in value of the collateral
- Coverage for business interruption
- Coverage for emergency response costs
- Additional limit for legal expense
- Public relations coverage
- Insured entities include special and master servicers and trustees
- Assignable to subsequent purchasers of the loan

In Summary



- Discovery of Additional Contamination
- Aggravation of Existing Contamination
- Improper / Inadequate Clean Up
- Discovery of Unknown Contamination
- Contamination of Adjacent Properties
- Third Party Bodily Injury Claims
- Third Party Property Damage Claims
- Spread of Existing Contamination
- Control of Clean Up Costs
- Security of Lender

Summary

Brownfield Challenge = Brownfield Opportunity

Questions?

